



# PROPOSED RULE MAKING

**CR-102 (June 2004)**

(Implements RCW 34.05.320)

Do NOT use for expedited rule making

Agency: Employment Security Department

- ☒ Preproposal Statement of Inquiry was filed as WSR 06-03-064 ; or  
☐ Expedited Rule Making--Proposed notice was filed as WSR \_\_\_\_\_; or  
☐ Proposal is exempt under RCW 34.05.310(4).

- ☒ Original Notice  
☐ Supplemental Notice to WSR \_\_\_\_\_  
☐ Continuance of WSR \_\_\_\_\_

**Title of rule and other identifying information:** (Describe Subject) This filing adopts new rules and amends existing rules in Chapters 192-220 and 192-230 WAC. The rules pertain to the collection of overpaid unemployment benefits and list the criteria that will be used by the department to determine whether an overpayment should be waived in the interests of equity and good conscience, or the debt be settled for less than the full amount owed.

**Hearing location(s):**

Employment Security Department  
Maple Leaf Conference Room  
212 Maple Park  
Olympia, WA

**Submit written comments to:**

Name: Pamela Ames, ESD Rules Coordinator  
Address: Employment Security Department  
PO Box 9046, Olympia WA 98507-9046  
e-mail [pames@esd.wa.gov](mailto:pames@esd.wa.gov)  
fax (360)902-9799 by (date) Sept. 9, 2008

Date: September 10, 2008 Time: 10:00 a.m.**Assistance for persons with disabilities:** ContactBeverly Peterson by Sept 9, 2008TTY (360) 902-9569 or (360) 902-9234**Date of intended adoption:** September 15, 2008

(Note: This is NOT the effective date)

**Purpose of the proposal and its anticipated effects, including any changes in existing rules:** This filing amends existing rules, and adopts new rules, in Chapter 192-220 WAC, Overpayment Notice, Assessment and Fraud, and Chapter 192-230 WAC, Recovery of Benefit Overpayments. The rules describe the process by which an individual can request that overpaid unemployment benefits be waived, or negotiate to settle the debt for less than the full amount. The rules define the term "equity and good conscience" and list the criteria the department will use to determine whether a waiver or settlement should be granted for reasons of equity and good conscience. Existing rules are revised to clarify provisions related to the recovery of unemployment benefit overpayments.

**Reasons supporting proposal:** The Court of Appeals issued a published opinion holding that the department's definition of the term "equity and good conscience" was narrower than intended by the statute. The Court instructed the department to use the standard of "fairness" when deciding if an overpayment should be waived or a settlement accepted. The proposed rules are intended to comply with the court's ruling.

**Statutory authority for adoption:** RCW 50.12.010, RCW 50.12.040, and RCW 50.20.010**Statute being implemented:** RCW 50.20.190 and RCW 50.24.020**Is rule necessary because of a:**

Federal Law?

☐ Yes ☒ No

Federal Court Decision?

☐ Yes ☒ No

State Court Decision?

☒ Yes ☐ No

If yes, CITATION:

Delagrave v. ESD, 127 Wn. App. 596

**DATE****NAME** (type or print)

Karen T. Lee

**SIGNATURE****TITLE**

Commissioner

**CODE REVISER USE ONLY**

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08-15-159

(COMPLETE REVERSE SIDE)

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:  
None.

Name of proponent: (person or organization) Employment Security Department

☐ Private  
☐ Public  
☒ Governmental

**Name of agency personnel responsible for:**

| Name                         | Office Location         | Phone          |
|------------------------------|-------------------------|----------------|
| Drafting..... Juanita Myers  | 212 Maple Park, Olympia | (360) 902-9665 |
| Implementation....Nan Thomas | 212 Maple Park, Olympia | (360) 902-9303 |
| Enforcement..... Nan Thomas  | 212 Maple Park, Olympia | (360) 902-9303 |

**Has a small business economic impact statement been prepared under chapter 19.85 RCW?**

☐ Yes. Attach copy of small business economic impact statement.

A copy of the statement may be obtained by contacting:

Name:

Address:

phone ( ) \_\_\_\_\_

fax ( ) \_\_\_\_\_

e-mail \_\_\_\_\_

☒ No. Explain why no statement was prepared.

Any impact created by the rules affects all businesses, not just small businesses. If the overpayment is the result of a job separation that is not attributable to the employer, a tax-paying employer is not charged for benefits paid to the individual. These rules will not affect the employer's eligibility for relief of benefit charges. In addition, since the department receives approximately 80-90 requests for waiver each month, half of which are denied, the overall financial implications of these rules is expected to be minimal.

**Is a cost-benefit analysis required under RCW 34.05.328?**

☒ Yes A preliminary cost-benefit analysis may be obtained by contacting:

Name: Juanita Myers

Address:

Employment Security Department

PO Box 9046

Olympia WA 98507-9046

phone (360) 902-9665

fax (360) 902-9799

e-mail [jmyers@esd.wa.gov](mailto:jmyers@esd.wa.gov)

☐ No: Please explain:

AMENDATORY SECTION (Amending WSR 05-01-076, filed 12/9/04, effective 1/9/05)

**WAC 192-220-010** ~~((Overpayments — Notification to individual.))~~ Will I be notified about a potential overpayment?

(1) If a potential overpayment exists, the department will provide you with a ~~((#))~~ written overpayment advice of rights ~~((, in writing,))~~ explaining the following:

- (a) The reasons you may have been overpaid;
- (b) The amount of the possible overpayment as of the date the notice is mailed;
- (c) The fact that the department will collect overpayments as provided in WAC 192-230-100;
- (d) The fact that final overpayments are legally enforceable debts which must be repaid whether or not you are claiming unemployment benefits;
- (e) The fact that these debts can be the basis for warrants which can result in liens, notices to withhold and deliver personal properties, possible sale of real and personal properties, and garnishment of salaries ~~((, and possible sale of real and personal properties))~~;
- (f) An explanation that if you are not at fault, you may request a waiver of the overpayment ~~((, Waiver means the overpayment does not have to be repaid))~~; and
- (g) A statement that you have 10 days to submit information about the possible overpayment and whether you are at fault. ~~((Failure to do so means))~~ If you do not provide the information within 10 days, the department will make a decision based on available information about the overpayment and your eligibility for waiver.

(2) Any amounts deducted from your benefit payments for federal income taxes or child support are considered paid to you and will be included in the overpayment.

NEW SECTION

**WAC 192-220-017** Am I required to repay the overpayment? (1) You must repay the full amount of the overpayment, even if you are not at fault, unless you are granted a waiver. (See also WAC 192-230-110.) A waiver means you do not have to repay the overpayment.

(2) Except as provided in subsection (3), you are potentially eligible for a waiver of an overpayment when it would be against equity and good conscience for the department to require you to repay the full amount.

- (3) You are not eligible for a waiver when:
  - (a) You are at fault for the overpayment;
  - (b) The overpayment is the result of a discharge for misconduct or gross misconduct (see RCW 50.20.066(5));
  - (c) The overpayment is the result of a conditional payment of benefits;
  - (d) The overpayment decision was issued by a state other than Washington; or
  - (e) The overpayment is for disaster unemployment assistance benefits paid under Section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

AMENDATORY SECTION (Amending WSR 05-01-076, filed 12/9/04, effective 1/9/05)

**WAC 192-220-020 (~~Overpayments—Fault provisions.~~) When does the department consider me at fault for an overpayment?** (1) (~~When an overpayment occurs.~~) The department will (~~make a finding of~~) decide if you are at fault (~~or nonfault~~) for an overpayment based on information provided by you and your employer and from information contained in the department's records. (~~After reviewing all such information, y~~) You will be considered (~~to be~~) at fault (~~when the overpayment is~~):

(a) When the overpayment is (~~F~~) the result of fraud, misrepresentation, or willful nondisclosure; or

(b) (~~The result of a discharge for a felony or gross misdemeanor under RCW 50.20.065;~~

(c) ~~The result of a discharge for gross misconduct under RCW 50.04.294; or~~

(d) (~~Based on the presence of~~) When all of the following three elements are present:

(i) You were paid benefits in an amount greater than you were entitled to receive and you (~~accepted and retained~~) kept those benefits; and

(ii) (~~The payment of these benefits was based on~~) You provided incorrect information, (~~or a failure to furnish~~) did not disclose information which you should have provided, (~~as outlined in the information for claimants booklet, claimant directives and other reasonable written communications issued by the department;~~) or (~~information which~~) you caused another person to fail to disclose information; and

(iii) You had notice that the information should have been reported including, but not limited to, written communications from the department such as the unemployment claims kit and directives.

(2) You may be considered at fault, even though you provided the department with all relevant information before (~~the benefit eligibility~~) a decision was issued, (~~if the overpayment is the result of payment that~~) when you should reasonably have known the payment was improper. The following are some, but not all, examples where you should reasonably have known that a payment was improper (~~and as a result are at fault~~). These are (~~intended as~~) examples only and do not mean that the department would rule in this manner in every such situation.

(a) You correctly reported earnings but the department paid benefits at the full amount or incorrectly deducted the earnings.

(b) You reported that you were unavailable for one or more customary work days, but the department paid at the full amount and the payment was not a conditional payment.

(c) You received a retroactive pension payment that you had applied for and were reasonably sure would be awarded.

(d) You did not inform the department that you were eligible for benefits on an unexpired claim against another state.

(e) A lower level decision was reversed by the office of administrative hearings, the commissioner, or a court because of new information that you did not disclose to the department.

(f) Other circumstances in which the department (~~fact~~) finds (~~ing indicates that~~) you knew the payment was improper.

(3) In deciding (~~whether or not~~) if you are at fault, the department will also consider your education, mental abilities, emotional state, (~~your~~) experience with claiming unemployment benefits, and other (~~elements of your~~) personal (~~situation~~) factors which affect your (~~knowledge and~~) ability to (~~comply with~~) report (~~ing~~) all relevant information to the

department. This includes any written information ((contained in the information for claimants booklet, claimant directives and other reasonable written communications issued)) provided to you by the department.

(4) You ~~((will be considered to be without))~~ are not at fault when you provided the department with all relevant information before ~~((the benefit eligibility))~~ a decision ~~((is))~~ was issued and ~~((the overpayment is the result of payment that))~~ you would not reasonably have known the payment was improper. The following are some, but not all, examples of instances in which you may not reasonably have known that a payment was improper ~~((and as a result are not at fault))~~. These are ~~((intended as))~~ examples only and do not mean that the department would rule in this manner in every such situation.

(a) The department ~~((erroneously))~~ removed a payment stop in error, resulting in improper payment.

(b) You received a retroactive pension which was backdated by the pension source, not at your request.

(c) A combined wage or federal claim was filed against Washington that should have been filed against another state.

(d) Extended benefits were paid by the department when you would have been eligible for a new claim against Washington or another state.

(e) A lower level decision, in which you had provided all information, was reversed by the office of administrative hearings, the commissioner, or a court.

(f) Other circumstances in which the department ~~((fact))~~ finds~~((ing indicates))~~ you did not know the payment was improper.

#### AMENDATORY SECTION (Amending WSR 05-01-076, filed 12/9/04, effective 1/9/05)

**WAC 192-220-030 ~~((Overpayments — E))~~What does equity and good conscience mean? ~~((provisions:))~~** (1) ~~((The department will not consider or grant waiver of an overpayment and will not consider or accept an offer in compromise of an overpayment that is: — (a) Based on an overpayment decision written by a state other than Washington; — (b) The result of a conditional payment as provided in WAC 192-23-900; or — (c) For claims with an effective date of January 4, 2004, and later, the result of being discharged for misconduct or gross misconduct as provided in RCW 50.20.066(5).))~~ “Equity and good conscience” means fairness as applied to a given set of circumstances.

(2) ~~((Except as provided in subsection (1), the department will grant waiver of an overpayment when it is found that you were without fault in the overpayment and when it is determined that to require repayment would be against equity and good conscience.))~~ It will be against equity and good conscience to deny waiver when repayment of the overpayment would deprive you of income required ((for necessary living expenses)) to provide for basic necessities including food, shelter, medicine, utilities, and related expenses. ((+))Unless there are unusual circumstances which would argue against waiver((-)), the department will presume repayment would leave you unable to provide basic necessities if your total household resources in relation to household size do not exceed seventy percent of the Lower Living Standard Income Level (LLSIL) and circumstances are not expected to change within the next ninety days.

(3) ~~((You will be required to provide financial information to the department to determine if~~

~~the overpayment will be waived. Your failure to provide such information within 10 days from the request date will result in the department making a decision, based on available information, regarding your eligibility for waiver. The department may verify any financial information you provide. Any amount waived based on information that is later found to be fraudulent or misrepresented will be restored to the overpayment balance.~~

~~—(4) The financial information requested includes:~~

~~—(a) Your income and, to the extent available to you, other financially contributing members of the household for the previous month, the current month and the month following the date the financial information is requested;~~

~~—(b) Your current and readily available liquid assets. Liquid assets may include, but are not limited to, checking and savings account balances, stocks, bonds and cash on hand;~~

~~—(c) Your expenses for the previous month, the current month and the month following the date the financial information is requested;~~

~~—(5) If your average monthly expenses equal or exceed your average monthly income and there are no substantial liquid assets available, waiver of the overpayment will be considered. The presence of unusual circumstances may justify waiver on other than a financial basis when not to waive would be unconscionable;~~

~~—(6) When you have been denied waiver or waiver was not considered, you may enter into a payment agreement with the department;~~

~~—(7) Except as provided in subsection (1), when you have been denied waiver or have been unable to reach a payment agreement with the department you may make an offer in compromise as provided in RCW 50.24.020. The basis for allowing or denying an offer in compromise will be the same criteria used by the department for allowing or denying waiver of an overpayment. Any overpayment amount compromised based on information that is later found to be fraudulent or misrepresented will be restored to the overpayment balance.)) The department may also consider, but is not limited to, the following factors in determining whether waiver should be granted for reasons of equity and good conscience:~~

(a) Your general health, including disability, competency, and mental or physical impairment;

(b) Your education level, including literacy;

(c) Whether you are currently employed and your history of unemployment;

(d) Your future earnings potential based on your occupation, skills, and the local labor market;

(e) Your marital status and number of dependents, including whether other household members are employed;

(f) Whether an error by department staff contributed to the overpayment;

(g) Whether the employer contributed to the overpayment by providing inaccurate information or failing to respond to the department's request for information within a reasonable period of time;

(h) Whether you refused or were ineligible for other government benefits because you received unemployment benefits; and

(i) Other factors indicating that repayment of the full amount would cause you undue economic, physical, or mental hardship.

(4) The decision to grant or deny waiver will be based on the totality of circumstances rather than the presence of a single factor listed in subsection (3).

## NEW SECTION

**WAC 192-220-080 How do I obtain a waiver?** (1) When a decision is issued that creates an overpayment, the department will send you an application for waiver if you are potentially eligible.

(2) The waiver application asks for information concerning your financial condition and other circumstances which will help the department determine if the overpayment should be waived.

(3) The financial information requested includes documentation for the previous month, current month, and following month of your:

(a) Income and, to the extent available, the income of other household members who contribute financially to the household;

(b) Expenses; and

(c) Readily available liquid assets including, but not limited to, checking and savings account balances, stocks, bonds, and cash on hand.

(4) The completed application and supporting documents must be returned to the department by the 10 day response deadline indicated in the notice. If you do not provide the information within 10 days, the department will make a decision about your eligibility for waiver based on available information.

(5) A waiver cannot exceed the total amount of benefits available on your claim. The department will not waive the overpayment in such a way as to allow you to receive either a greater weekly benefit amount or a greater total benefit amount than you were originally eligible to receive. Any benefits waived are considered paid to you.

Example: You misplace a benefit check and request a replacement from the department. You subsequently cash both the original check and the replacement. Waiver will not be approved under these circumstances because you have been paid twice for the same week.

(6) If a waiver is approved based on information that is later found to be false or misleading, the amount waived will be restored to your overpayment balance.

## AMENDATORY SECTION (Amending WSR 05-01-076, filed 12/9/04, effective 1/9/05)

**WAC 192-230-100 (~~Recovery of benefit overpayment — By repayment or offset against past or future benefits.~~) What amount will be offset from my benefits to repay the overpayment?** (1) If you do not repay an overpayment in full or make the minimum monthly payments provided for in WAC (~~(+92-28-130))~~192-230-030, the principal amount will be deducted from benefits payable for any week(s) you claim. Interest, penalties, surcharges, and court costs will not be deducted from benefit payments; they must be repaid.

(2) For overpayments assessed under RCW 50.20.010 because you asked to have your unemployment insurance claim cancelled, the amount deducted will be one hundred percent of benefits payable for each week(s) you claim. The department will ensure you are informed of the advantages and/or disadvantages of cancelling an existing claim to file a new claim.

(3) If you are currently claiming benefits, the overpayment will not be offset from future weeks payable unless you have missed a portion of two or more payments as provided in WAC (~~(+92-28-130))~~192-230-030. If you have missed a portion of two or more payments, the

overpayment will be offset as described in (a) and (b) below:

(a) If the overpayment was caused by a denial for fraud, misrepresentation, or willful nondisclosure as provided in RCW 50.20.070, the amount deducted will be one hundred percent of benefits payable for each week(s) you claim. These overpayments will be collected first.

(b) For all other overpayments, the amount deducted will be fifty percent of benefits payable for each week you claim. However, you may request the overpayment be repaid at one hundred percent of benefits payable for each week you claim. Note that the fifty percent deduction is based on your total weekly benefit amount, before deductions for such items as pensions, child support, income taxes.

(4) If the overpayment has been assessed by another state, the amount deducted will be as follows:

(a) For overpayments caused by a denial for fraud, misrepresentation, or willful nondisclosure, the amount deducted will be one hundred percent of benefits payable for each week(s) you claim. These overpayments will be collected first.

(b) For all other overpayments, the amount deducted will be fifty percent of benefits payable for each week you claim. However, you may request the overpayment be repaid at one hundred percent of benefits payable for each week you claim.

~~((5) If you have been denied waiver, or if waiver was not considered, you will be notified in writing of your right to enter into a payment agreement with the department or to make an offer in compromise. An offer in compromise will not be approved if the overpayment was caused by a denial under RCW 50.20.065 or 50.20.070 unless there are unusual circumstances which would justify a compromise. An offer in compromise will not be approved if the overpayment was caused by a denial under RCW 50.20.066.))~~

## NEW SECTION

**WAC 192-230-110 May I negotiate with the department to repay less than the full amount?—RCW 50.24.020.** (1) Yes. State law permits the department to accept an offer in compromise for less than the full amount owed. For purposes of this chapter, an offer in compromise is referred to as a negotiated settlement.

(2) Except as provided in subsection (3), a negotiated settlement of the overpayment for less than the full amount owed will be considered under subsection (2)(a). Settlement offers may also be made by authorized department staff.

(a) The department will consider a settlement offer when it would be against equity and good conscience to require you to repay the full amount. The department may consider, but is not limited to, the following factors in making this decision:

- (i) Your general health, including disability, competency, and mental or physical impairment;
- (ii) Your education level, including literacy;
- (iii) Whether you are currently employed and your history of unemployment;
- (iv) Your future earnings potential based on your occupation, skills, and the local labor market;
- (v) Your marital status and number of dependents, including whether other household members are employed; and



(vi) Other factors indicating that collection of the full amount would cause you undue economic, physical, or mental hardship and you are unable to provide for basic necessities as described in WAC 192-220-030(2).

(b) In considering settlement offers, the emphasis will be on what is financially advantageous to the department. The department will consider the costs of collection compared to the amount of the overpayment. In doing so, the department may consider such factors as the age and amount of the overpayment, the number of prior contacts with you, whether you previously made good faith efforts to pay the debt, the tools available to enforce collection, and other information relevant to your ability to repay.

(c) If you previously applied for a waiver and were denied and your circumstances have significantly changed, such as catastrophic illness or loss of income, you may ask to negotiate a settlement for less than the full amount of the overpayment.

(3) A negotiated settlement for less than the full amount owed will not be considered when:

(a) The overpayment is the result of a discharge for misconduct or gross misconduct (see RCW 50.20.066(5));

(b) The overpayment decision was issued by a state other than Washington; or

(c) The overpayment is for disaster unemployment assistance benefits paid under Section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

(4) The department's decision to accept or reject a settlement offer is final. However, if the settlement offer is rejected, you are permitted to make another offer at a later date if circumstances change.

## NEW SECTION

**WAC 192-230-120 Will a settlement offer be accepted if my overpayment is the result of fraud, misrepresentation, or willful nondisclosure?** Except in unusual circumstances, a settlement offer will not be accepted when your overpayment is the result of fraud, misrepresentation, or willful nondisclosure. Unusual circumstances that may warrant a negotiated settlement of the overpayment and associated penalties include, but are not limited to, long-term or terminal illness, severe permanent disability, or other circumstances that seriously impair your long-term ability to generate income.

## NEW SECTION

**WAC 192-230-130 How do I make a settlement offer?** You may contact the department's collection unit in writing or by telephone and make an offer to settle the debt for less than the full amount owing. Specify the amount you are offering to repay and be prepared to provide financial and other information in support of your offer. The department may request a credit report to verify the information you provide. The department will notify you of its decision to accept or decline your offer.